

DECISION



25459
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-210223.2

DATE: June 14, 1983

MATTER OF: Peach State Sanitation Co., Inc.

DIGEST:

1. Where an agency initiates a negotiated procurement when it should have conducted an advertised procurement, the contracting officer has a reasonable basis to cancel the request for proposals in order to issue an invitation for bids.
2. Where neither the prices received in response to a request for proposals (RFP) nor the relative positions of offerors have been disclosed and the protester merely presents speculation as to the greater risk of disclosure arising from the agency's cancellation the RFP and resolicitation under an invitation for bids, the fear of a possible auction is not a sufficient reason to object to resolicitation.

Peach State Sanitation Co., Inc., protests the cancellation of request for proposals No. F09650-82-R-0402, issued by the Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, for refuse collection and disposal at Robins AFB, and the subsequent resolicitation of these services under invitation for bids No. F09650-83-B-0009. We deny the protest.

After the Air Force issued the RFP for refuse collection and disposal at Robins AFB on November 5, 1982, Reliable Trash Service, Inc. protested the solicitation to the Air Force, alleging, in part, that a negotiated procurement was improper because an advertised procurement was feasible and practicable. Reliable did not submit a proposal. The contracting officer denied the protest, indicating that it was impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the required services.

After receiving notice of the denial of its protest, Reliable filed a protest with our Office. While this protest was pending, Headquarters, Air Force Logistics

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Command, concluded that since the requirement was routine and the specifications detailed, the procurement for refuse collection did not warrant an exception to the statutory preference for advertising. See 10 U.S.C. § 2304(a) (1976), as amended by Pub. L. 97-86, § 907(a), 95 Stat. 1117 (1981). The Command therefore directed Robins to cancel the RFP and resolicit for these services under a formally advertised invitation for bids. Reliable accordingly withdrew its protest. Peach State, the incumbent contractor, then protested the cancellation and resolicitation to our Office.

As a general rule, purchases and contracts for supplies and services shall be made by formal advertisement unless both it is neither feasible nor practicable to procure by advertisement and the agency determines that negotiation is necessary under one of several exceptions enumerated in section 2304(a). See B.B. Saxon Company, Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410; Washington Patrol Service, Inc., et al., B-188375, September 21, 1977, 77-2 CPD 209. This preference for advertising applies even to procurements made, as apparently is the case here, as total small business set-asides. B.B. Saxon Company, supra.

A protester disputing an agency's determination that a procurement must be made by advertising bears the burden of clearly showing that it is neither feasible nor practicable to procure by advertisement and that negotiation is necessary under one of the exceptions enumerated in section 2304(a). See Washington Patrol Service, supra. This Peach State has not done.

We note, however, that even if Peach State had alleged that procurement by advertisement was impracticable, the circumstances of this procurement suggest otherwise. We have previously indicated that procurements of trash collection services are commonly conducted by the Federal Government using formal advertising. See Kenilworth Trash Company, B-204913, June 7, 1982, 82-1 CPD 540. Further, the Air Force informs us that of the nine contracts for refuse collection and disposal awarded by the Air Force Logistics Command in the last 3 years, eight of the contracts were formally advertised, while the other one was awarded to the Small Business Administration for subcontracting under the section 8(a) program. There is no indication of anything unique or different in this

procurement that might warrant procurement by negotiation. We therefore must assume that the Air Force correctly concluded that this procurement for refuse collection and disposal should be conducted by formal advertisement.

Peach State argues that the Air Force is engaged in a paper exercise which may "set the record straight" insofar as using the correct procurement method is concerned, but at the risk of compromising the competitive position of firms such as itself who submitted offers under the RFP. It fears that if the prices offered under the RFP should inadvertently be disclosed, an auction could result, and it asserts that, since those bidders who were offerors under the RFP have incurred proposal preparation costs, they are at a competitive disadvantage in relation to bidders, such as Reliable, who did not submit proposals.

Contracting agencies have broad discretion in determining when it is appropriate to cancel a solicitation. When negotiation procedures are used, the Government need only establish a reasonable basis for cancellation. American Indian Health Systems, Inc., B-206218, July 12, 1982, 82-2 CPD 38. As a general rule, where an agency conducts a negotiated procurement when it should have conducted an advertised procurement, then the contracting officer has a reasonable basis to cancel the RFP in order to issue an invitation for bids. See Washington Patrol Service, supra; NJE Corporation, B-185787, August 3, 1976, 76-2 CPD 117.

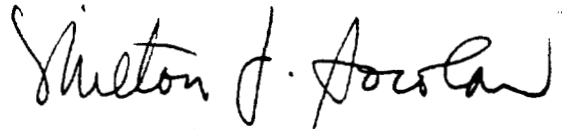
We have denied requests that a procurement which improperly has been negotiated be re-solicited through advertising where adequate competition has been obtained and the results of the procurement would have been the same regardless of the method of procurement used, because the protester in those instances has not been prejudiced and a resolicitation would be tantamount to sanctioning a prohibited auction. See, e.g., Telectro-Mek, Inc., B-190653, April 13, 1979, 79-1 CPD 263. We agree with the Air Force that this case is distinguishable in that it cannot be said that (1) results of the competition would have been the same using either negotiation or advertising since at least one firm--Reliable--did not respond to the RFP or (2) that Reliable, the firm which protested the use of negotiation, was not prejudiced because it is clear that Reliable did not compete under the first solicitation because of the method of procurement used. In addition,

the Air Force's action does more than merely correct the record; it also corresponds to the statutorily expressed preference for formal advertisement wherever practicable. Under these circumstances, the Air Force had a reasonable basis to cancel the RFP in order to issue an invitation for bids.

With respect to Peach State's assertion that a resolicitation may result in an auction, a practice prohibited by regulation, the Air Force informs us that neither the prices nor the relative positions of the offerors have been disclosed. Peach State's mere speculation as to the supposedly increased risks of disclosure arising from the cancellation and resolicitation does not provide a basis for objecting to the action taken here.

Finally, that small business concerns may have expended funds preparing proposals does not justify continuation of a procurement which the agency properly believes to be in conflict with legal requirements.

The protest is denied.

A handwritten signature in black ink, appearing to read "Shelton J. Jordan". The signature is fluid and cursive, with a large initial "S" and a long, sweeping underline.

Acting Comptroller General
of the United States